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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALBERT EBO, Plaintiff and Appellant, v. THE TJX COMPANIES, INC., et al. Defendants and Respondents.	B285404 (Los Angeles County Super. Ct. No. BC380575)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Reversed and remanded with directions.

The Van Vleck Law Firm and Brian F. Van Vleck for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

Plaintiff and appellant Albert Ebo (Ebo) appeals a judgment granting final approval of a class action settlement of an action against The TJX Companies, Inc., Marshalls of CA, LLC, and TJ Maxx of CA, LLC (collectively, TJX). Ebo's sole contention on appeal is that the trial court erred in awarding him attorney fees of $5,886.50 and an enhancement award of $750, rather than attorney fees of $85,000 and an enhancement award of $7,500, as the parties had stipulated.

We conclude the trial court applied incorrect criteria in ruling on Ebo's requests for attorney fees and for an enhancement award. We therefore reverse the judgment and remand for a new determination, guided by the principles set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The class action litigation.*

Ebo commenced this action against TJX, a clothing retailer, in November 2007. The operative first amended complaint alleged causes of action for (1) failure to provide meal and rest breaks, and (2) failure to provide accurate itemized wage statements. The wage statement claim alleged that TJX, the employer, failed to include "the name and address of the legal entity employing the employee" in its wage statements.[1]

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[1] Labor Code section 226, subdivision (a), requires wage statements to include, inter alia, "the name and address of the legal entity that is the employer[.]" The record reflects that the challenged wage statements merely depicted a logo for Marshalls, rather than the name and address of the employer.

All further statutory references are to the Labor Code, unless otherwise specified.

In November 2008, Ebo filed a motion for class certification of his claims that TJX failed to provide meal and rest breaks and failed to provide accurate wage statements.

In January 2009, the trial court denied class certification of the meal and rest break claims. It certified the wage statement claim, but limited the class to non-exempt employees of Marshalls of CA, LLC. In March 2009, Ebo filed a notice of appeal from the order denying certification of the meal and rest break class.

In May 2010, TJX reformatted its wage statements to include the omitted information.

On May 1, 2013, this court affirmed the order denying certification of the meal and rest break claims. (*Ebo v. The TJX Companies, Inc., et al.* (May 1, 2013, B214937) [nonpub. opn.].)

The parties participated in a mandatory settlement conference before Judge Dunn, and in November 2016, they entered into a joint stipulation for settlement of the class action. Ebo then brought a motion for preliminary approval of the class action settlement.

Under the terms of the settlement, TJX agreed to make a cash payment of up to $150,000 (the "Minimum Settlement Amount") to be distributed as follows: (1) $45,000 for the costs of the settlement administrator, Simpluris, Inc.; (2) an attorney fee award of $85,000 to class counsel; (3) reimbursement of costs and litigation expenses of $12,500 to class counsel; and (4) a $7,500 enhancement award to Ebo, the lead plaintiff, for his time and efforts in prosecuting the case. Further, separate and apart from the Minimum Settlement Amount, TJX agreed to make settlement payments to individual class members for injuries caused by the allegedly incomplete wage statements. "Examples

of injuries may include bank fees, check cashing fees, or other costs that arose from the allegedly incomplete wage statements. To be eligible for an Individual Settlement Payment, the Class Member must attach evidence of actual injury directly caused by the incomplete wage statements."

In December 2016, the trial court (Judge Highberger) granted preliminary approval to the class action settlement. In doing so, the trial court found: "It . . . appears to the Court on a preliminary basis that: (a) the proposed Settlement amount is fair and reasonable to the Class Members when balanced against the probable outcome of further litigation in relation to certification of the class, liability, damages issues and potential appeals; (b) significant investigation, formal and informal discovery, research, and litigation have been conducted such that counsel for the Parties at this time are able to reasonably evaluate their respective positions; (c) settlement at this time will avoid substantial costs, delay and risks that would be presented by the further prosecution of the litigation; and (d) the proposed Settlement has been reached as the result of intensive, serious and non-collusive negotiations between the Parties, which were facilitated by Judge James R. Dunn during the Parties' Mandatory Settlement Conference."

Thereafter, notices were mailed to the class members. Of 22,083 class members, there were three requests for exclusion, and two objections were submitted to the claims administrator.[2] Claim forms for monetary payments were submitted by 146 class members, but none of those submissions successfully provided

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[2] The objections were not directed to the request for attorney fees or to the enhancement award for the lead plaintiff.

documentation of an actual injury resulting from defective wage statements.

2. *Unopposed motions for final approval of the settlement, for an award of $85,000 in attorney fees, and for a $7,500 enhancement award to Ebo.*

On July 26, 2017, Ebo filed a motion for final approval of the class action settlement, and a separate motion for an award of attorney fees, costs, and an enhancement, pursuant to the terms of the settlement. Both motions were unopposed.

The motion for attorney fees, costs, and an enhancement award was supported by the declaration of Ebo's lead counsel, who stated that he had 26 years of experience as a labor and employment law litigator specializing in wage and hour class actions and had been lead counsel in dozens of such cases. With respect to the amount of attorney fees being requested, the motion stated that the "lodestar" fees of $588,650 had been incurred during nearly a decade of litigation, and the requested fee award of $85,000 was only 14.4 percent of the benchmark lodestar calculation. Further, class counsel undertook the *TJX* litigation on a contingency basis with no guarantee of payment, the firm incurred substantial out-of-pocket costs with no guarantee of reimbursement, and the litigation required the firm to forgo other paying legal work. Also, while TJX did not admit liability, the lawsuit was a catalyst to TJX modifying its wage statements to cure the alleged statutory violation. In sum, the moving papers asserted the "unopposed fee award requested by Class Counsel pursuant to the Settlement is an inherently reasonable request as a matter of law."

The request for a $7,500 enhancement award to Ebo was supported by the declarations of Ebo and his counsel. The papers

argued that $7,500 was a reasonable award given: Ebo's time and expense to travel from Detroit to San Francisco to attend his full-day deposition, missing a day of work to do so; the risk to his employment prospects in the retail industry for having sued Marshalls in a high profile class action; his extensive assistance to class counsel; and his having entered into a broader release of all known and unknown claims under Civil Code section 1542, which exceeded the scope of the claims released by the other class members.

3. *Trial court's ruling*.

On August 18, 2017, after hearing the matter and taking it under submission, the trial court gave final approval to the class action settlement. The trial court approved attorney fees in the reduced sum of $5,886.50, which was just one percent of the $588,650 lodestar amount and a fraction of the requested amount of $85,000. As for the enhancement award to Ebo, the trial court approved $750, rather than the $7,500 that had been requested.

At the outset, the trial court acknowledged "[t]he employer did change the text of its paystubs in response to notice of this litigation." However, the trial court reasoned that because none of the class members had submitted a valid claim for monetary payment, "the dollar value of the benefits obtained for the class members at the end of the day was ZERO."

The trial court stated: "Plaintiff['s] attorneys claim a lodestar of $588,650 for attorney fees for hourly rates up to $750/hour, capped per settlement agreement and notice to the class at no more than $85,000.00. They also claim actual costs of $16,159.54, capped per settlement agreement and notice to the class at no more than $12,500.00. Plaintiff Albert Ebo seeks an incentive award of $7,500.00. He provides a sworn declaration,

but he does not attempt to make a factual showing that he actually suffered any injury personally by way of '[e]xamples of injuries [such as] bank fees, check cashing fees, or other costs that arose directly from the allegedly incomplete employer address information on the paystubs,' to quote from the Claim Form."

The trial court explained: "In deciding on how large an attorney fee award is justified under the lodestar method, the Court may consider various factors including the difficulty of the claim, the uniqueness of the legal issues, the time invested by counsel, the benefits (if any) obtained for the class and the risk of failure (i.e. contingent nature of [the] award). Here since zero of 22,083 class members showed they suffered any actual injury from the alleged misconduct of defendant and plaintiff Ebo himself did not do so, the benefits conferred on the class are close to illusory. Yes, they now get paystubs with a bit more information, but they were not demonstrably harmed by the prior state of affairs. Certain costs, e.g. for [the] claims administrator, are valid since they were required to comply with the notice/due process requirements. The Court will also allow the capped attorney costs amount sought since these dollars were actually spent. The Court finds, however, that this class action furnished virtually no benefit at all on the class (since they had not been demonstrably harmed) and that a reasonable fee award to counsel and incentive award to plaintiff under the circumstances is substantially less than the amount sought. There was no 'common fund' created here since the potential payments to class members were contingent on proof of actual injury and the other anticipated out-of-pocket settlement payments were each for items subject to judicial review and approval."

The trial court concluded: "In the prudent exercise of discretion, mindful of the value of legal services in the area market during the relevant time and the trivial benefits conferred on the class, *the Court allows attorney fees of $5,886.50, which is one percent of the lodestar amount*. *Since the class obtained zero monetary recovery from this ill-advised litigation*, the 'percentage of recovery' amount due to plaintiff's counsel would likewise be zero. The Court is using the lodestar method (albeit with a substantial reduction to reflect the trivial non-monetary benefits conferred on the class) to justify the making of ANY attorney fee award. [¶] Similarly, the Court awards plaintiff an incentive payment of $750.00 to cover the reasonable value of his time for the benefit conferred on the class and for what the Court assumes to be his approximate cost of airfare to travel from Detroit to California." (Italics added.)

In accordance with the August 18, 2017 ruling, the trial court entered a judgment that provides, at paragraph 9, for an award of attorney fees to class counsel in the amount of $5,886.50, and at paragraph 10, an enhancement award of $750 to Ebo.

On September 28, 2017, Ebo filed a timely notice of appeal from the judgment.

CONTENTIONS

Ebo contends: he has a legal right to recover reasonable attorney fees incurred in the litigation; the trial court applied an arbitrary and incorrect legal standard by imposing a 99 percent lodestar reduction; and the trial court erred in denying his request, as the named plaintiff, for a reasonable enhancement award of $7,500.

DISCUSSION

1. *Trial court abused its discretion in awarding one percent of the lodestar amount as attorney fees on the ground there was no pecuniary recovery.*

a. *General principles.*

" ' "[T]he primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method. The lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." ' " (*In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1052.)

In class action litigation, because the trial judge has a fiduciary responsibility to protect absent class members whose rights may not have been given due regard by the negotiating parties, the "court has a duty, independent of any objection, to assure that the amount and mode of payment of attorney fees are fair and proper, and may not simply act as a rubber stamp for the parties' agreement. [Citation.] ' "The evil feared in some settlements—unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client—can best be met by a careful . . . judge, sensitive to the problem, properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee . . . ." ' [Citation.]" (*Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 555—556.)

b. *Standard of appellate review*.

" ' " 'The standard of review on issues of attorney's fees . . . is abuse of discretion. The trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice.' " ' [Citation.] As with all orders and judgments, this fee order 'is presumed correct, all intendments and presumptions are indulged in its favor, and ambiguities are resolved in favor of affirmance.' [Citation.] '[A]scertaining the fee amount is left to the trial court's sound discretion. [Citations.] Trial judges are entrusted with this discretionary determination because they are in the best position to assess the value of the professional services rendered in their courts. [Citations.]' [Citation.] Thus, the court's fee award ' "will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' [Citation.]" (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 882 (*Ellis*).)

" ' "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." [Citation.]' [Citation.]" (*Ellis*, *supra*, 218 Cal.App.4th at p. 882.)

The discrete issue before us is whether the trial court applied an incorrect legal standard in awarding one percent of the lodestar on the ground that the class members did not obtain a pecuniary recovery and that TJX's modification of its paystubs was a trivial, nonmonetary benefit.

c. *The fact that the claims process did not result in a pecuniary recovery for class members is not a basis for awarding one percent of the lodestar amount; the statutory scheme also authorizes employees to sue for injunctive relief and the class action lawsuit was successful in that regard.*

The fee-setting inquiry in California ordinarily begins with the lodestar, i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.)

Here, the trial court's ruling reflects that its rationale for reducing the lodestar by 99 percent was that "the class obtained zero monetary recovery from this ill-advised litigation." The trial court found that TJX's modification of wage statements in response to the lawsuit was a "trivial non-monetary benefit[] conferred on the class."

However, the absence of a monetary recovery does not equate with the lack of a benefit to the class. Although the claims process concluded in 2017 without a pecuniary recovery by the class members—due to their inability to provide documentary evidence of an injury that they suffered as the direct result of incomplete information on their paystubs—TJX's modification of its wage statements in May 2010, three years into the litigation, was *not* a trivial benefit conferred on the class.

Section 226 states in relevant part at subdivision (a) that a wage statement must include "(8) the name and address of the legal entity that is the employer." The statute also provides that any employee suffering injury as a result of a knowing and

intentional failure by an employer to provide a compliant wage statement may recover $50 for the initial violation and $100 for subsequent violations, up to an aggregate penalty of $4,000 per employee, as well as costs and attorney fees. (§ 226, subd. (e)(1).) In addition, the statute provides that an employee "may also bring an action for injunctive relief to ensure compliance with this section, and is entitled to an award of costs and reasonable attorney's fees." (§ 226, subd. (h).) All these provisions, relating to the contents of a wage statement, penalties, and injunctive relief, were in place in 2007 at the time Ebo commenced this action. (Stats. 2005, ch. 103, § 1; form. § 226, subds. (a), (e), & (g).)[3]

The record reflects that the first amended complaint sought injunctive relief to bring TJX's wage statements into compliance with section 226, subdivision (a), and as the trial court recognized in its ruling, "[t]he employer did change the text of its paystubs in response to notice of this litigation." Accordingly, Ebo's lawsuit achieved the equivalent of injunctive relief in the litigation. Because section 226 authorizes employees to sue for injunctive relief to obtain the employer's compliance with the statute, the trial court erred in characterizing TJX's revision of its wage statements as a "trivial non-monetary benefit[] conferred on the class." Further, because a violation of section 226 is the proper subject of an action for injunctive relief, the trial court

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[3] The statute was amended in 2012 to provide that an employee "is *deemed to suffer injury*" if the wage statement fails to include the name and address of the employer. (Sen. Bill No. 1255 (2011—2012 Reg. Sess.) § 1, italics added; see now § 226, subd. (e)(2)(B)(iii).) That enactment occurred two years after TJX modified its wage statements in May 2010 to include the omitted information.

erred in finding the litigation was "ill-advised" because the class obtained "zero monetary recovery."

In addition, TJX's reformatting of its wage statements in May 2010 did not render the action moot. Thereafter, the issue remained of the class members' entitlement to damages and statutory penalties for TJX's past conduct. The fact that the class members ultimately were unable to supply documentation such as "bank fees, check cashing fees, or other costs that arose directly from the allegedly incomplete employer address information on the paystubs that [they] received" does not support the trial court's conclusion that the litigation was "ill-advised."

We also note the trial court's decision to reduce the lodestar by 99 percent appears to be at odds with its preliminary and final approvals of the class action settlement. In those rulings, the trial court repeatedly determined the settlement was "fair and reasonable to the Class Members," had been reached "as the result of intensive, serious and non-collusive negotiations between the Parties," was the product of "arms-length negotiations," had been entered into "in good faith," and was "fair, just, reasonable, and adequate as to the Parties." A " 'presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.' " (*Carter v. County of Los Angeles* (2014) 224 Cal.App.4th 808, 820.) Here, there were only two objectors, neither of whom objected to the award of $85,000 in attorney fees to class counsel. In view of the trial court's determination that the matter was not settled at the expense of

the absent class members, and the lack of any objection to the award of attorney fees to class counsel, the 99 percent reduction in the lodestar amount does not appear to be within the bounds of a reasonable exercise of discretion by the trial court.

While we are mindful that all intendments and presumptions are indulged in favor of the trial court's ruling (*Ellis, supra,* 218 Cal.App.4th at p. 882), the record does not provide a basis for upholding the trial court's decision to award one percent of the lodestar amount. Arguably, if the record reflected that 99 percent of Ebo's counsel's efforts were expended on the failed meal and rest break claims, that would support the trial court's decision to award only one percent of the lodestar amount. However, the moving declaration of Attorney Brian F. Van Vleck does not support such an inference. Counsel's declaration stated that the lodestar calculation for the 10-year period, beginning in November 2007, was $588,650, and the moving papers requested fees of $85,000 or 14.4 percent of the lodestar amount. However, the declaration merely showed the total hours expended by counsel; there was no allocation of time as between the meal and rest break claim and the wage statement claim. Therefore, the trial court could not reasonably infer that 99 percent of counsel's time was expended on the failed meal and rest break claims.

We are also guided by the principle that, "[w]hile . . . class action fee awards that are unjustifiably large create problems for the bench and bar, awards that are too small can also be problematic, as they chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims." (*Lealao v. Beneficial California,*

Inc. (2000) 82 Cal.App.4th 19, 53.) Here, the trial court's 99 percent reduction in the lodestar amount, notwithstanding Ebo's success in having TJX modify its wage statements, has the potential to chill private enforcement through the vehicle of a class action.

In sum, the trial court abused its discretion in reducing the lodestar amount by 99 percent on the ground the class members did not obtain a pecuniary recovery, and in concluding that TJX's reformatting of its wage statements was a "trivial non-monetary benefit[] conferred on the class." Therefore, the inadequate attorney fee award must be reversed and the matter remanded for further proceedings to be guided by the principles stated herein.

2. *Trial court abused its discretion with respect to the amount of the enhancement award.*

The same considerations that led the trial court to award class counsel a minimal award of one percent of the lodestar also guided its decision to award Ebo an enhancement award of $750 instead of the $7,500 that was requested.

We note that the $7,500 enhancement award to Ebo was negotiated by the parties, and that amount does not appear to be unreasonable. (See, e.g. *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393—1395 [upholding enhancement award of $10,000 to each of four class representatives].) The record reflects that in addition to the costs and travel expenses that Ebo incurred to attend his day-long deposition, he actively participated in the litigation and assisted in the investigation of the class claims. He spent at least 200 hours in connection with the litigation, supplied information regarding TJX's policies and organization, and provided necessary documents and information

to respond to written discovery requests and to prepare for the taking of TJX's person most knowledgeable and manager depositions. Ebo also agreed to a broad Civil Code section 1542 waiver of all of his own claims against TJX, including his individual meal and rest break claims alleged in the complaint.

Further, the enhancement award to Ebo could not affect recovery by the absent class members because there was no common fund. Also, no objections were asserted below to Ebo's enhancement award, and the motion seeking the enhancement award was unopposed (as is the appeal).

Given these circumstances, we conclude the $750 enhancement award to Ebo amounted to an abuse of discretion.

3. *Remand for further proceedings*.

In an appropriate case, a reviewing court may modify the judgment appealed from. (Code Civ. Proc., §§ 43, 906.) " 'Whenever an appellate court may make a final determination of the rights of the parties from the record on appeal, it may, in order to avoid subjecting the parties to any further delay or expense, modify the judgment and affirm it, rather than remand for a new determination. [Citations.]' [Citations.]" (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547; see generally, 5 Cal.Jur.3d Appellate Review, § 698.)

We conclude, however, that remand is the preferable approach here, to enable the trial court to rule on the matter anew, guided by the principles articulated herein. This is because, as a reviewing court, our role is to review the trial court's exercise of its discretion, not to determine appropriate attorney fee and enhancement awards in the first instance. Further, as stated in *Collier v. Harris* (2015) 240 Cal.App.4th 41, 57—58, which reversed and remanded for the trial court to decide

the second prong of an anti-SLAPP motion (Code Civ. Proc., § 425.16), "when we decide a matter in the first instance, we deprive the parties of a layer of independent review available to them when the matter is decided initially by the trial court. We think it best that the able and experienced trial judge decide the issue."

On remand, the trial court is directed to reconsider Ebo's requests for attorney fees and an enhancement award without regard to the fact that the class members did not obtain a pecuniary recovery, bearing in mind that employees are authorized to sue for injunctive relief to ensure an employer's compliance with the statute (§ 226, subd. (h)) even in the absence of actual injury, and that Ebo succeeded in obtaining TJX's compliance with the statute. In exercising its discretion with respect to the amount of attorney fees to be awarded, the trial court shall be guided by the usual factors including the nature of the litigation, the complexity of the issues, the experience and expertise of counsel, the amount of time involved, and whether the amount requested was based upon unnecessary or duplicative work. (*See*, *e.g.*, *Ketchum v. Moses*, *supra*, 24 Cal.4th at pp. 1131—1134; *In re Vitamin Cases*, *supra*, 110 Cal.App.4th at p. 1052.)

DISPOSITION

The August 18, 2017 judgment granting final approval of the class action settlement is reversed with respect to paragraph 9 (the award of attorney fees to class counsel) and paragraph 10 (the enhancement award to Ebo), and the matter is remanded for further proceedings consistent with this opinion; in all other respects, the judgment is affirmed. In the interests of justice, because there was no appearance by TJX on appeal, Ebo shall bear his own appellate costs. (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

I concur:

LAVIN, J.

EGERTON, J., Dissenting.

I respectfully dissent. While TJX did change its wage statements in the course of this litigation to list its full legal name (Marshalls of CA, LLC) and address rather than just its name (Marshalls), Ebo continued to litigate the case—unsuccessfully—for many more years. At the end of the day, not a single class member suffered any injury or loss from the defective wage statements. In the trial court, Ebo's counsel made no effort to separate the hours he spent on his consistently unsuccessful meal and rest break cause of action from those he spent on his wage statement cause of action. In my view, the court did not abuse its discretion in reducing the $92,500 award Ebo and his lawyer sought for attorney fees and an "enhancement award."

As this court noted in its May 2013 opinion affirming Judge Gregory Alarcon's denial of Ebo's motion for class certification on his meal and rest period cause of action, Marshalls fired Ebo in October 2007 for poor performance. (*Ebo v. The TJX Companies, Inc.* (May 1, 2013, B214937) [nonpub. opn.] ("*Ebo I*").) He filed this lawsuit a month later. (*Id.* at p. 3.) In response to Ebo's motion for class certification, TJX filed 38 declarations by store managers and assistant managers "throughout California," including declarations from three managers at the Bakersfield store where Ebo worked during his last eight months with Marshalls in California. The declarations established that at the Bakersfield Marshalls and "in dozens of other stores throughout California," TJX scheduled managers' work shifts "in a way that always, or virtually always, allowed [managers] to take timely meal and rest periods." (*Id.*) This court noted "the declarations stated that it was store or company policy and practice to allow

employees, including [assistant managers], to take uninterrupted meal and rest periods." "Most of the declarants stated that their store followed a two-hour rule of thumb, which permitted employees to take a rest period within the first two hours of their shift, and either a meal period or rest period every two hours thereafter." (*Id.*)

In support of his motion for preliminary approval of the class action settlement, Ebo's lead lawyer Brian F. Van Vleck, of Van Vleck Turner & Zaller LLP, submitted a declaration that he had "interview[ed] numerous witnesses," "review[ed] voluminous documents," served discovery and "analyzed" TJX's responses, and taken one deposition. In support of his later motion for attorney fees, Van Vleck submitted a declaration that he had spent 756 hours on the case at $750/hour. Van Vleck declared others at his firm also had worked on the case: two other partners for 17 hours at $650/hour, two associates for 20 hours at $450/hour, and a law clerk for eight hours at $200/hour. Van Vleck personally logged more than 94% of the total hours. He stated the "Lodestar Value" was $588,650. Van Vleck did not break down the total hours or fees for those spent on the meal and rest break claim and those spent on the wage statement claim. Van Vleck stated in his declaration, "[U]pon request by the Court, Class Counsel will provide written print outs of time record reports including . . . activity descriptions for *in camera* review in the event the Court wishes to review these entries."[1]

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[1] I cannot fault the trial court for apparently declining the opportunity to pore over a decade of counsel's time sheets. Van Vleck could have done the math and submitted a one-paragraph declaration stating he spent "x" hours on the meal and rest break claim and "y" hours on the wage statement claim.

Van Vleck stated, "This was a hard-fought litigation spanning almost a decade." But it was "hard-fought" and went on for years because Ebo continued to pursue his meal and rest break claim—a claim that ultimately failed. (In the meantime, TJX changed its wage statements nine years ago.) Ebo of course had the right to appeal Judge Alarcon's denial of his motion to certify a class on the meal break claim. But he is not entitled to run up tens of thousands of dollars in attorney fees on a claim that he first lost in 2009 (*Ebo I*), and continued to lose, and then use that total as his proposed "lodestar." It is likely the vast majority of Van Vleck's time in this litigation was spent on the meal and rest break claim. As for the wage statement claim, all one needs is (1) the wage statement Marshalls was using, which listed its name as "Marshalls" rather than "Marshalls of CA, LLC" and omitted its address, and (2) the statute. There is nothing to "investigate," "discover," or litigate.

Accordingly, if—say—five percent of Van Vleck's 756 hours were spent on the wage statement claim, the lodestar was $28,350 and the superior court (Judge William Highberger) gave Van Vleck nearly 21% of the lodestar. If ten percent of Van Vleck's hours were spent on the claim resulting in a change by TJX to its wage statements, then the lodestar is $56,700 and the court gave him 10.4% of that lodestar. Given that not a single person in the class of more than 22,000 individuals had

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Our extremely busy complex litigation courts understandably may not be able to spend hours and hours parsing the time counsel spent on ultimately meritless claims from those spent on claims with merit, causing further delay in cases that already have dragged on far too long.

so much as one dime of injury or damages, I cannot find this to be " ' "clearly wrong" ' " or an abuse of the " 'sound discretion' " of the judge who lived with this case for years. (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 882.) Claims administrator Jarrod Salinas of Simpluris, Inc. advised the court the administrator had received 146 claim forms. Not one was a valid claim. Salinas added that one class member objected to the settlement, stating he "had no problems with his paystubs." The other objector simply objected, without stating a reason.

"[O]ur Supreme Court has repeatedly observed that a lodestar figure may be adjusted not just upward but also, where appropriate, *downward*." (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 840 (*Thayer*).) A trial court may " 'take into account a variety of . . . factors' " (in addition to the number of hours reasonably expended), including " 'the novelty and complexity of the issues' " and " 'the results obtained.' " (*Id.* at p. 833.) The court also may consider the " 'rate of acceptance' " —the degree to which the settlement benefits were in fact of interest to class members." (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 61.) Here, nothing about Ebo's wage statement cause of action appears to be "novel" or "complex." (Cf. *Thayer*, at pp. 835-836 [though bank may have violated law, class's claims did not "rest . . . on new or complicated theories" under governing statutes].) As far as the "results obtained," as noted, not a single class member identified any loss, injury, or damage. And the "settlement benefits" seem to have been of no interest to the vast majority of class members: less than .007% of the class (146 individuals out of 22,083) even submitted a claim.

" 'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' " (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 488.) "[A]n appellate court will interfere with a determination of reasonable attorney fees 'only where there has been a manifest abuse of discretion.' " (*Thayer, supra,* 92 Cal.App.4th at pp. 832-833, quoting *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228.)

Finally, as for the "enhancement award" to Ebo, Van Vleck stated Ebo had to travel from Detroit to California for one day of deposition. But Ebo chose to file his lawsuit in California.[2] Van Vleck stated in his declaration that Ebo also "provided valuable information regarding Defendants [*sic*] policies and organization." It is difficult to discern what this means. As this court noted in *Ebo I*, Ebo never had spoken to any managers or assistant managers "at other California stores owned and operated by [TJX] regarding meal and rest periods. He concede[d] that he ha[d] no personal knowledge of the practices regarding meal and rest periods in California stores other than the Bakersfield Marshalls." (*Ebo I.*)

Class actions play a critical role in our justice system, permitting large groups of people who have been harmed to be compensated, even though each person's individual claim may

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[2] Ebo worked for TJX as an assistant store manager in Michigan for 27 months. In February 2007, he transferred to the Marshalls store in Bakersfield, California. Marshalls fired him eight months later. (*Ebo I.*) Ebo apparently moved back to Michigan at some point after that.

be small. Legitimate class actions—including those involving rest breaks—legitimately result in large awards. (*See, e.g.*, *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 261 [security guards who were not relieved of duty during rest periods received about $90 million in damages, interest, and penalties].) Counsel in those cases rightly receive appropriately large fee awards. (*See, e.g.*, *Augustus v. ABM Security Services, Inc.* (Dec. 31, 2014, B243788, B247392) [nonpub. opn.] [counsel awarded approximately $31.5 million in attorney fees].[3]) But when courts reward lawyers who file class actions with little or no merit by awarding tens of thousands of dollars in attorney fees, the result will be more class actions with little or no merit. The public will begin to view class actions with skepticism and cynicism. Here, ultimately, the individuals who will pay the $92,500 Ebo and Van Vleck seek are Marshalls shoppers—the teen buying a dress for the school dance, the single mother outfitting her three children for Easter.

I would affirm the superior court.

EGERTON, J.

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[3] I take judicial notice of the fee award as stated by the court of appeal.